Supreme Court, U.S.
FILED

RECD
AND
BRIEFS

No. _____ 10-825

NOV 24 2010

OFFICE OF THE CLERK

In The

Supreme Court of the United States

WENDELL MARUMOTO,

Cross-Petitioner,

v.

VIRGIL E. DAY, et al.,

Cross-Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

H. WILLIAM BURGESS
Counsel of Record
2299C Round Top Drive
Honolulu, Hawaii 96822
(808) 947-3234
hwburgess@hawaii.rr.com

Attorney for Cross-Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Whether Wendell Marumoto's motion to intervene as of right as a plaintiff in compliance with Rule 24(a)(2) may be disposed of by the entry of summary judgment in favor of defendants (with a single sentence stating the order "renders moot Wendell Marumoto's motion to intervene") but without applying the four-part test to evaluate his claim for intervention as of right or otherwise considering his motion on the merits;

Whether the summary judgment order met the requirements of the mootness doctrine and did render moot Marumoto's motion;

Whether, because of the exceptional circumstances presented in this case, should the following dispositive federal questions, that Marumoto seeks to raise, also be reviewed:

> a. Since Hawaii's federally-created Ceded Lands Trust has never, since statehood, produced annual net income from which distributions to trust beneficiaries could lawfully be made, should control of the hundreds of millions of dollars of improper past distributions exclusively to the Office of Hawaiian Affairs, "OHA," and still held by OHA, be returned to the State executive branch to be managed for the benefit of *all* citizens of Hawaii, including but not limited to native Hawaiians;

and

PARTIES TO THE PROCEEDING

Cross-Petitioner is Wendell Marumoto, Plaintiff-intervenor-Appellant.

Cross-Respondents are Virgil E. Day, Josiah L. Hoohuli, Mel Hoomanawanui, Patrick L. Kahawaiolaa and Samuel L. Kealoha, Jr., Plaintiffs-Appellants;

Haunani Apoliona, individually and in her official capacity as Chairperson and Trustee of the Office of Hawaiian Affairs; Rowena Akana, Donald Cataluna, Colette Y. Pi'ipi'i Machado, Boyd P. Mossman, Oswald Stender, John D. Waihe'e IV, Walter Meheula Heen, and Robert K. Lindsey Jr., individually and in their official capacities as Trustees of the Office of Hawaiian Affairs; Dante Carpenter and Linda Keawe'ehu Dela Cruz, former Trustees, in their individual capacities, Defendants-Appellees;

and

State of Hawaii, Defendant-intervenor-Appellee.

QUESTIONS PRESENTED - Continued

b. Whether the State, Trustee of the Ceded Lands Trust, or its agency OHA, may, without violating basic trust law principles, the Constitution and/or civil rights laws of the United States, continue to discriminate between trust beneficiaries on the basis of race.

TABLE OF CONTENTS – Continued

Page

The State sheds some significant light 13

Marumoto's previous petition for a writ of certiorari in the related appeal 15

REASONS FOR GRANTING THE PETITION..... 17

I. MARUMOTO'S RIGHT TO INTERVENE ... 17

F.R.Civ.P. Rule 24(a)(2)(a) Intervention of Right 17

II. TRUST LAW AS TO DISTRIBUTIONS TO BENEFICIARIES 25

State: Beneficiaries only entitled to net income 26

CONCLUSION 32

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	viii
OPINION AND ORDERS BELOW	1
JURISDICTION	3
RULE 29.4(b) NOTIFICATION	3
PROVISIONS INVOLVED	3
F.R.Civ.P. Rule 24(a)(2). Intervention of right	3
Resolution No. 55 of July 7, 1898, 30 Stat. 750 (known as the "Annexation Act" or "Newlands Resolution")	4
Hawaiian Homes Commission Act, 1920 (Act of July 9, 1921, c42, 42 Stat. 108)	4
The Admission Act, an Act to Provide for the Admission of the State of Hawaii into the Union (Act of March 18, 1959, Pub. L. 86-3, 73 Stat. 4)	5
State of Hawaii Constitution Article XII Hawaiian Affairs	6
The Civil Rights Act, 42 U.S.C. § 1983	6
STATEMENT OF THE CASE	6
Introduction	6
Procedural background: The much needed elucidation	8

TABLE OF AUTHORITIES – Continued

Page

STATUTES

The Admission Act [73 Stat. 4], 1959 § 5(f) ..... *passim*

Resolution No. 55 of July 7, 1898, 30 Stat. 750 (known as the "Annexation Act" or "Newlands Resolution") 4

28 U.S.C. § 1254(1) 3, 16

28 U.S.C. § 1331 3

28 U.S.C. § 1343(3) 3

28 U.S.C. § 1343(4) 3

28 U.S.C. § 2202 3

28 U.S.C. § 2403(a) 3

42 U.S.C. § 1983 ..... 6, 10

Hawaiian Homes Commission Act, 42 Stat. 108 (1921) ("HHCA") 4

Hawaiian Homes Commission Act ("HHCA"), § 201 4

Hawaiian Homes Commission Act ("HHCA"), § 208 5

Uniform Trustees' Powers Act, Haw. Rev. Stat. 554A-3(c)(22) 20

Uniform Trustees' Powers Act, Haw. Rev. Stat. Chapter 554A-5(b) 20

Uniform Principal and Income Act, Haw. Rev. Stat. 557A 25

Uniform Principal and Income Act, Haw. Rev. Stat. 557A-201 25

TABLE OF AUTHORITIES

Page

CASES

Arakaki v. Lingle, 477 F.3d 1048 (9th Cir. 2007) 10, 24

Day v. Apoliona, 496 F.3d 1027 (9th Cir. 2007) 8, 9, 23

Day v. Apoliona, 505 F.3d 963 (9th Cir. 2007) 10

Day v. Apoliona, 616 F.3d 918 (9th Cir. 2010) 1, 24

Day v. Apoliona, Civil No. 05-00649 SOM/BMK 2, 12, 13, 15, 20

Kapiolani Park Preservation Society v. City & County of Honolulu, 69 Haw. 569, 751 P.2d 1022 (1988) 21

Kuroiwa v. Lingle, Civil No. CV 08-00153 JMS-KSC 12, 15, 20, 23

Pele Defense Fund v. Paty, 73 Haw. 578, 837 P.2d 1247 (1992) 22

Price v. Akaka, 928 F.2d 824 (9th Cir. 1991) 21

State v. Zimring, 58 Hawaii 106, 566 P.2d 725 (1977) 19

Trustees of OHA v. Yamasaki, 69 Hawaii 154 (1987) 19

CONSTITUTIONS

Constitution of the State of Hawaii, Art. XII, Sec. 6 ..... 6, 29

TABLE OF AUTHORITIES – Continued

Page

2A Scott & Fratcher, The Law of Trusts, § 182 26

3A Scott & Fratcher, The Law of Trusts, § 244 27

Supreme Court Practice, Ninth Edition 16

TABLE OF AUTHORITIES – Continued

Page

Haw. Rev. Stat. § 708-830(6)(a) 29

Haw. Rev. Stat. § 708-974 29

RULES

F.R. Civ. P. Rule 24(a)(2) ..... *passim*

Rules of the Supreme Court
Rule 29.4(b) 3

OTHER AUTHORITIES

H. William Burgess & Sandra Puanani Burgess, *The Ceded Lands Case: Money intended for education goes to OHA,* Hawaii Bar Journal, July 2001 14

Federal Rules of Civil Procedure, Rules and Commentary, Gensler, 2010 Vol. 2 23

Op. U.S. Atty. Gen. 574 (1899) 19

Restatement 2d of the Law of Trusts
§ 199 9
§ 200 9

Restatement of Trusts, § 170 21

Restatement of the Law, Second, Trusts, 1959
§ 233(1) 25
§ 233(1)(a) 25
§ 233(2) 26

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

If the Court grants the *Day, et al.* petition (as Wendell Marumoto respectfully believes it should because of the recently revealed extraordinary three-decades-long and still continuing race-based breach of, indeed theft from, Hawaii's largest public trust which is the subject of this suit), then it must also grant review of the deprivation of Marumoto's right to intervene and the dispositive federal questions presented in this conditional cross-petition. As this case illustrates, special status, privilege and entitlements for one racial class have become the accepted norm in the State of Hawaii. Only this Court can now restore the rule of law to Marumoto and the over one million citizens of the United States similarly situated who have their homes in Hawaii but are burdened and diminished because they lack the favored ancestry.

OPINION AND ORDERS BELOW

July 26, 2010 final Opinion, Ninth Circuit Court of Appeals in No. 08-16704, *Day v. Apoliona*, 616 F.3d 918 (9th Cir. 2010) (which affirmed the June 20, 2008 District Court Order Granting Second Motion for Summary Judgment in favor of defendants, which purported to moot Marumoto's motion to intervene) is reprinted in the *Day* petition beginning at page A-2.

June 20, 2008 U.S. District Court, Hawaii, order granting second motion for summary judgment in

Day v. Apoliona, Civ. No. 05-00649 SOM/BMK (which stated that it "rendered moot" Marumoto's motion to intervene) is not reported in F.Supp.2d. It is available at WL 2511198 D. Hawaii, 2008 and is reprinted in the *Day* petition beginning at page A-17.

Also relevant to consideration of the questions presented are the following orders in the related Ninth Circuit No. 08-16668 in which Marumoto appealed from the same June 20, 2008 summary judgment order of the District Court:

December 22, 2009 Order of the Ninth Circuit Court of Appeals in No. 08-16668 denying Marumoto's petition for panel or en banc rehearing. (Cross Pet. App. 8)

October 16, 2009 Memorandum disposition in the related Ninth Circuit No. 08-16668 (affirming the district court's denial of Marumoto's motion to intervene) which was not selected for publication in the Federal Reporter. It is available at *Day v. Apoliona*, 334 Fed.Appx. 121, 2009 WL 3326422, 1 (C.A.9). (Cross Pet. App. 5)

The May 29, 2009 Order of the Ninth Circuit Court of Appeals in No. 08-16668 denying Marumoto's motion for injunction pending appeal is reprinted in (Cross Pet. App. 10)

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The basis for federal jurisdiction in the first instance in the District Court is 28 U.S.C. §§ 1331 (federal question), 1343(3) and 1343(4) (civil rights) and 2202 (declaratory judgment).

The Opinion of the Ninth Circuit Court of Appeals sought to be reviewed was filed July 26, 2010. The *Day* petition for a writ of certiorari was filed October 25, 2010. This conditional cross-petition is being timely filed November 24, 2010.

RULE 29.4(b) NOTIFICATION

Because 28 U.S.C. § 2403(a) may apply, Cross-Petitioner will serve this cross-petition on the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N.W., Washington D.C. 20530-0001.

PROVISIONS INVOLVED

F.R.Civ.P. **Rule 24. Intervention**

(a) **Intervention of Right**. On timely motion, the court must permit anyone to intervene who:

. . .

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Resolution No. 55 of July 7, 1898, 30 Stat. 750 (known as the "Annexation Act" or "Newlands Resolution")

The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition: PROVIDED, That all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.

Hawaiian Homes Commission Act, 1920 (Act of July 9, 1921, c42, 42 Stat. 108)

§ 201. Definitions . . .

"Native Hawaiian" means any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.

§ 208. Conditions of leases. Each lease made under the authority granted the department by section 207 of this Act, and the tract to which the lease and the tract in respect to which the lease is made, shall be deemed subject to the following conditions, whether or not stipulated in the lease:

(1) the original lessee shall be a native Hawaiian not less than eighteen years of age . . .

(2) the lessee shall pay a rental of $1 a year for the tract and the lease shall be for a term of ninety-nine years . . .

The Admission Act, An Act to Provide for the Admission of the State of Hawaii into the Union (Act of March 18, 1959, Pub. L. 86-3, 73 Stat. 4)

§ 5(f). The lands granted to the State of Hawaii by subsection (b) of this section . . . shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined by the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such

manner as the constitution and laws of said State may provide,. . . .

State of Hawaii Constitution Art. XII
Hawaiian Affairs

Powers of Board of Trustees

§ 6. The board of trustees of the Office of Hawaiian Affairs shall exercise power as provided by law; to manage and administer the proceeds from the sale or other disposition of the lands . . . including all income and proceeds from that pro rata portion of the trust referred to in section 4 of this article for native Hawaiians; . . .

The Civil Rights Act, 42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Introduction

Conditional Cross-Petitioner Wendell Marumoto is a citizen and registered voter of the State of Hawaii

and the United States. He was born and raised and has lived in Hawaii all his life except for the years at college and graduate school and employment in San Francisco for two years following graduation. He is of Japanese ancestry, the third generation of his family in Hawaii, and has three grandchildren with a modicum of Hawaiian ancestry.

As beneficiaries of Hawaii's Ceded Lands Trust,[1] he and his family members are among the equitable owners of the trust corpus that is the source of the money, land and power at issue in this appeal.

His declaration and personal statement (Cross Pet. App. 71) filed with his motion to intervene in the district court, attest to:

> Hawaii's progression from the Hawaiian Homes Commission Act "HHCA," generally accepted during his teen years as fair because it was limited in scope and duration; to the trend in recent decades, exemplified by

---

[1] Hawaii's Ceded Lands Trust (also known as the "Public Land Trust" and the "§ 5(f) trust") originated in 1898 with the Annexation Act. The Republic of Hawaii ceded all its public lands (about 1.8 million acres formerly the Crown lands and Government lands of the Kingdom of Hawaii) to the United States with the requirement that all revenue from or proceeds of these lands except for those used for the civil, military or naval purposes of the United States or assigned for the use of local government, "shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." Newlands Resolution, Annexation Act, 30 Stat. 750 (1898) (See Provisions Involved).

the defendants' position in this suit, to make the special treatment permanent and extend it to an ever-increasing number of persons, including those with only one drop of the favored ancestor's blood.

I want to intervene here to ask this Honorable Court to preserve the just and prosperous society and government of the State of Hawaii to whose development my ancestors and the others contributed after coming to Hawaii from more than 150 years ago.

With all due respect, I believe the Sovereignty movement, Akaka bill, Ho'oulu Lahui Aloha, To Raise a Beloved Nation, Kau Inoa, and the demands for special privilege, money, lands and power based solely on a smidgen of favored ancestry, have brought Hawaii to the brink of self-destruction. Only the judiciary can save Hawaii now, and I pray that it will do so.

Procedural background:
The much needed elucidation.

On August 7, 2007 the Ninth Circuit Court of Appeals entered its decision in this case, *Day v. Apoliona*, 496 F.3d 1027, 1034, n.9 (9th Cir. 2007) (reversing the District Court's dismissal on the ground that *Day* plaintiffs as trust beneficiaries had no rights enforceable under 1983). The Court of Appeals reviewed the law of the Ninth Circuit with respect to Hawaii's Ceded Lands Trust, noting "the

lands ceded in the Admission Act are to benefit '*all* the people of Hawaii,' not simply Native Hawaiians." (emphasis in original):

> Our discussions of standing, rights of action, and the scope of the § 5(f) restrictions have arisen in cases brought by Native Hawaiian individuals and groups. But neither our prior case law nor our discussion today suggests that as a matter of federal law § 5(f) funds must be used for the benefit of Native Hawaiians or Hawaiians, at the expense of other beneficiaries. *Id.*

At 496 F.3d 1033 the Ninth Circuit Court of Appeals reaffirmed that basic trust law principles apply to Hawaii's Ceded Lands Trust and that beneficiaries have the right to enforce them in federal court.

> The instant case involves a public trust, and under basic trust law principles, beneficiaries have the right to "maintain a suit (a) to compel the trustee to perform his duties as trustee; (b) to enjoin the trustee from committing a breach of trust; [and] (c) to compel the trustee to redress a breach of trust." Restatement 2d of the Law of Trusts, § 199; see also *id.* § 200, comment a.

In the closing paragraph, at 496 F.3d 1039 and 1040, the Ninth Circuit Court said,

> Cases related to the OHA's expenditure of funds for Native Hawaiians have reached our court on numerous prior occasions, but we and the district court have shed little

> light on the merits of § 5(f) claims. See generally *Arakaki v. Lingle*, 477 F.3d 1048, 1052-53 (9th Cir.2007) (citing cases). Absent further foundational issues with Day's claim, today's affirmance of our existing precedent should permit much-needed elucidation of the substance of § 5(f).

A little over two months later, on October 11, 2007 the Ninth Circuit Court granted the State of Hawaii's motion to intervene and ordered filed the State's petition for rehearing and rehearing en banc.

> The State of Hawaii was amicus curiae in this matter in proceedings before the district court and on appeal. It presented an argument that was potentially dispositive of this case, namely, that plaintiffs do not have individual rights under § 5(f) of the Hawaiian Admission Act that are enforceable through 42 U.S.C. § 1983. Defendants, including the state Office of Hawaiian Affairs (OHA), took no position with regard to that question.

Day v. Apoliona, 505 F.3d 963, 964 (9th Cir. 2007)

In effect, by its argument that the *Day* plaintiffs have no rights enforceable under § 1983, the State of Hawaii sought to permanently close the door of the federal courts to all beneficiaries of Hawaii's federally-created Ceded Lands Trust. If the State had its way, the federal judiciary would provide no redress for breach of that federally-created trust by the Trustee State of Hawaii or by its agency, OHA.

Concerned at this threat to fundamental rights of trust beneficiaries, six non-Hawaiians (represented by the same attorney as now represents Marumoto in this case) on November 13, 2007 moved in the Ninth Circuit to intervene "on their own behalf and on behalf of the over one million Hawaii citizens similarly situated" to oppose the State's petition for rehearing.

On November 30, 2007 the Ninth Circuit Court denied the State's petition for rehearing and rejected the State's petition for en banc rehearing. (Cross Pet. App. 12) By a separate order also on November 30, 2007, the Court of Appeals denied the six non-Hawaiians' motion to intervene "without prejudice to renewal before the district court on remand." (Cross Pet. App. 14)

On remand to the district court, a scheduling conference was held January 3, 2008 and the magistrate judge entered an amended scheduling order (Cross Pet. App. 16) as follows:

Non-jury trial to commence	November 18, 2008 at 9:00 a.m.
Final pretrial conference	October 7, 2008 at 9:00 a.m.
Final pretrial statements due	September 30, 2008
Motions to join additional parties or amend pleadings due by	April 18, 2008
Other non-dispositive motions	August 20, 2008
Dispositive motions to be filed by	June 18, 2008
Motions in limine to be filed by	October 28, 2008

(Neither the six non-Hawaiians nor Marumoto nor their attorney were notified of the scheduling conference or served with the amended scheduling order.)

On March 28, 2008, OHA Defendants moved again in the District Court for summary judgment.

On May 5, 2008 the attorney for the six non-Hawaiians (who also represents Wendell Marumoto in this action) wrote to the Hawaii Attorney General and two of his deputies reminding them of their and their clients' conflicts and demanding that "some capable attorney free of conflict, inform the Trustee State of Hawaii and its Governor and other responsible officials of their fiduciary duties to all the beneficiaries; and vigorously oppose the OHA motion." (Cross Pet. App. 22)

The State Attorney General did not reply. Instead of protecting the trust and the interests of all the beneficiaries by opposing OHA's motion, the State supported summary judgment in favor of OHA.

On May 29, 2008 the six non-ethnic Hawaiians moved for consolidation of briefings and hearings in *Kuroiwa v. Lingle*, CV 08-00153 JMS-KSC and *Day v. Apoliona*, CV 05-00649 SOM-BMK as to the two issues of "standing" and "expenditure of trust funds to support the Akaka bill." The grounds of the motions were that both the actions involve common questions of fact and law; are brought by beneficiaries of the Ceded Lands Trust against the OHA Trustees; the State or its officials are defendants; and the

plaintiffs in both cases challenge OHA's expenditure of Ceded Lands Trust funds to support the Akaka bill, among other things. (Cross Pet. App. 27)

On May 30, 2008, the District Courts in both *Day v. Apoliona*, CV 05-00649 SOM-BMK and *Kuroiwa v. Lingle*, 08-00153 JMS-KSC denied the motion to consolidate the hearings and briefings. (Cross Pet. App. 31)

The State sheds some significant light.

On June 4, 2008, the State of Hawaii commendably began the much-needed elucidation. It publicly revealed for the first time documentation showing that the Ceded Lands Trust costs the State many times more each year than the 1.2 million acres bring in; that such a disparity between trust expenditures and receipts has occurred in every year since Statehood in 1959; and that the State has never before advanced this theory to the District Court or to the Ninth Circuit Court. (Cross Pet. App. 38)

Exhibit H to State Director of Budget and Finance Georgina K. Kawamura's Declaration shows interest paid on bonds for various capital improvement projects for the five most recent fiscal years. For example, the interest paid for FYE 2007 was $237,494,513. (Cross Pet. App. 45) State Land Information Systems Manager in the Land Division of the DLNR, Arthur J. Buto's declaration (Cross Pet. App. 50) reports total receipts from the § 5(f) lands for that year as $128,480,574. From that he deducted:

Airports receipts of $41.8 million (which under federal law must be used for airport improvements); Affordable housing developments receipts of $4.8 million; and reimbursements and pass-throughs of $21.6 million; for the adjusted total receipts in FYE 2007 from the ceded lands of $60,280,573. (To this effect, see also the State's memo in support at Cross Pet. App. 55-57)) Thus, the interest expense of $237.49 million paid by the State for capital improvement bonds alone (presumably for capital improvements to the ceded lands) for FYE 2007 was almost four times the $60.28 million adjusted total ceded lands receipts that year.

(As will be seen in the argument section below under the heading "Trust law as to distributions to beneficiaries," the absence of any net annual trust income since Statehood has major implications.)

Marumoto's attorney, on behalf of trust beneficiaries who lack the favored ancestry, has asked the State since 1999 whether the Ceded Lands Trust generates any net income. See *The Ceded Lands Case: Money intended for education goes to OHA*, Hawaii Bar Journal, July 2001. (Cross Pet. App. 74) The State on June 4, 2008 finally provided the indisputable answer: It never came close.

On June 16, 2008, (after the State had demonstrated it did not intend to fulfill its duty as Trustee to defend the trust, and the two District Courts had declined to consolidate the hearings and briefings)

Wendell Marumoto moved to intervene in this case "to assert a claim against defendants for breach of trust similar to the complaint in *Kuroiwa v. Lingle*, Civil No. CV 08-00153 JMS-KSC. (Cross Pet. App. 59)

On June 20, 2008, the District Court granted OHA's second motion for summary judgment and directed entry of final judgment in favor of Defendants. (Petitioners' A-17 – A-39) Other than noting the order "renders moot" Wendell Marumoto's motion to intervene (June 16, 2008), the 39 page order makes no mention of the State's revelation that the Ceded Lands Trust costs the State far more in interest alone than the 1.2 million acres bring in, or the impact of that and the other federal questions raised in Wendell Marumoto's motion to intervene.

Marumoto's previous petition for a writ of certiorari in the related appeal.

On March 22, 2010, Marumoto filed a petition for a writ of certiorari in No. 09-1165 in this Court, seeking review of the Memorandum disposition filed by the Court of Appeals for the Ninth Circuit, October 16, 2009 in No. 08-16668. This Court denied that petition on May 24, 2010. Marumoto does not know the reason for the denial but it may have been because the other appeal, Ninth Circuit No. 08-16704, from the same underlying final judgment of the District Court of June 20, 2008 in Civ. No. 05-00649 (which purported to "render moot" Wendell

Marumoto's motion to intervene) had not yet been finally decided by the Court of Appeals. If the Ninth Circuit Court of Appeals reversed the District Court judgment, Marumoto's motion to intervene would no longer be moot and review by the high court would be obviated.

Now that the Ninth Circuit Court in No. 08-16704 on July 26, 2010 has affirmed the underlying judgment of the District Court, and the Day parties have petitioned for a writ of certiorari, Marumoto must participate to protect his and the interests of those similarly situated. He urges this Court to grant both the *Day* petition and this conditional cross-petition.

A would-be, but unsuccessful, intervenor has standing to seek certiorari under § 1254(1) from the action of a court of appeals denying intervention. And "any party" to a case in the federal court of appeals may apply to this Court, even before judgment of the court of appeals. Supreme Court Practice, Ninth Edition, at 86, and n.29. Ordinarily, a putative intervenor cannot petition for review of any other aspect of the judgment below. Yet there have been rare occasions where the Court has recognized that the interests of justice demand admitting such a person as a party or as an intervenor for the first time at the Supreme Court level. Such an instance would be of the unusual variety. *Id.* at 427.

Here, there was no order denying Marumoto's right to intervene, only the summary judgment order.

The validity of that order cannot be considered without becoming aware that the state and its agency, as fiduciaries, for three decades have been plundering the Ceded Lands Trust. Ignoring that malfeasance, as the courts below have done, would condone and perpetuate the plunder.

REASONS FOR GRANTING THE PETITION AND CROSS-PETITION

I. MARUMOTO'S RIGHT TO INTERVENE

F.R.Civ.P. **Rule 24. Intervention**

(a) **Intervention of Right**. On timely motion, the court must permit anyone to intervene who: . . .

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Marumoto's motion to intervene was supported by his declaration and memorandum in support showing he met all the criteria for intervention as of right. The District Court held no hearing on Marumoto's motion and made no findings of fact or conclusions of law. No party submitted evidence or pleadings in the trial court in opposition to his intervention. Nor did the Ninth Circuit Court of Appeals take evidence or hear oral argument on Marumoto's

appeal. Docket 9/23/2009 ordered No. 08-16668 to be submitted on the briefs with no oral argument. The Court of Appeals' Memorandum disposition filed October 16, 2009 in No. 08-16668 affirmed the District Court's "denial" of Marumoto's motion to intervene but actually the District Court's only mention of Marumoto's motion was one sentence, "This order also renders moot Wendell Marumoto's motion to intervene (June 16, 2008)."

The Court of Appeals with no evidence before it, cited two cases (holding that judgment creditors have no right to intervene in suits between judgment debtors and third parties), found that Marumoto "does not establish that the disposition of the action may as a practical matter impair or impede his ability to protect his interests." But that overlooks or misapprehends that this is an action for breach of trust. The duties of fiduciaries to beneficiaries are governed by trust law principles rather than the rules of arms-length business dealings between creditors and debtors.

The Supreme Court of Hawaii has recognized that the public lands of Hawaii were "impressed with a special trust" in the 1898 joint resolution of annexation, that "trusteeship of such lands was transferred to the State upon admission" in 1959; and that "the equitable ownership of the public lands of Hawaii has always been in its people."

> "The concept that the public lands of Hawaii were impressed with a special trust,

> implicit in the joint resolution of annexation, see 22 Op. U.S. Atty Gen. 574, was *reiterated* in section 5(f) of the Admission Act." *Trustees of OHA v. Yamasaki*, 69 Hawaii 154, 160 (1987). (Emphasis added.)
>
> "The federal government has always recognized the people of Hawaii as the equitable owners of all public lands; and while Hawaii was a territory, the federal government held such lands in "special trust" for the benefit of the people of Hawaii." *State v. Zimring*, 58 Hawaii 106, 124, 566 P.2d 725 (1977). "Excepting lands set aside for federal purposes, the equitable ownership of the subject parcel and other public land in Hawaii has always been in its people. Upon admission, trusteeship to such lands was transferred to the State, and the subject land has remained in the public trust since that time." *Id.* at 125.

It is the Trustee-State of Hawaii's diversion of revenues from the ceded lands exclusively to OHA and OHA's spending or wasting or losing those trust funds, which impair and impede Marumoto's ability to protect his equitable ownership interest in those lands and revenues, and give him the right to intervene.

As detailed in the Statement of the Case above, before spending the time and money of intervening, his attorney tried a more simple approach. On May 5, 2008 his attorney, on behalf of other clients and all persons similarly situated, wrote to the Hawaii Attorney General (Cross Pet. App. 22) reminding him

of his duty as attorney for the State as Trustee, and the State's conflicting duties under two trusts and to vigorously oppose the OHA motion." The Attorney General did not respond.

On May 29, 2008 Marumoto's attorney moved to consolidate the hearings and briefings in the *Day* and *Kuroiwa* cases. This would have obviated intervention and the attendant expense, but on May 30, the judges in both cases denied the consolidation.

Then on June 16, 2008 Marumoto moved to intervene in the District Court in *Day v. Apoliona*. His non-dispositive motion (Cross Pet. App. 59) was properly and timely filed during the motions stage, over 2 months before the cut-off date for non-dispositive motions; and 5 months before the date set for trial. No issue of timeliness was raised, although many months later, on appeal, OHA did assert the motion was untimely. There was no need to rush to judgment. None of the parties would have been prejudiced by Marumoto's intervention. A trustee with conflicting duties under two trusts has a duty to seek, not avoid, court instructions before exercising the affected trust powers.

The Uniform Trustees' Powers Act, HRS § 554A-5(b) and the common law it codifies allow a trustee to exercise a trust power, such as the power "to effect distributions of money and property," § 554A-3(c)(22), "only by court authorization" "if the duty of the trustee and the . . . trustee's interest as trustee of another trust, conflict in the exercise of a trust power." The

common law foundation of the UTPA is found in Restatement of Trusts, § 170.

The State's duty to all the people of Hawaii as trustee of the Ceded Lands Trust conflicts with its interest under the OHA laws in bettering the conditions of native Hawaiians and Hawaiians at the expense of the other beneficiaries. Yet, without court authorization, the State has distributed hundreds of millions in ceded lands trust funds and properties to OHA exclusively for native Hawaiian and/or Hawaiian beneficiaries but has distributed no ceded lands trust funds or properties to or exclusively for all the rest of the beneficiaries. OHA still held $450 million of trust funds as of 6/30/07.

The same considerations apply to the OHA defendants. Under *Price v. Akaka*, 928 F.2d 824, 827 (9th Cir. 1991), so long as § 5(f) trust income remained in the hands of the state, as it did when transferred from the § 5(f) corpus to the OHA corpus, the § 5(f) obligations applied.

Since the § 5(f) trust funds, continue to be held for *all* the people of Hawaii so long as the funds are in the hands of OHA, the OHA Trustees have a fiduciary duty to all the people that conflicts with their interest in bettering the conditions of native Hawaiians and Hawaiian beneficiaries at the expense of the other beneficiaries.

In *Kapiolani Park Preservation Society v. City & County*, 69 Haw. 569, 572 (1988), the Hawaii

Supreme Court held that, where a governmental agency is the trustee of a charitable trust and

> will not seek instructions of the court as to its duties, even though there is a genuine controversy as to its power to enter into a particular transaction and where the attorney general as *parens patriae* has actively joined in supporting the alleged breach of trust, the citizens of this State would be left without protection, or a remedy, unless we hold, as we do, that members of the public, as beneficiaries of the trust, have standing to bring the matter to the attention of the court.

The Hawaii Supreme Court later cited that ruling with approval in *Pele Defense Fund v. Paty*, 73 Haw. 578, 594, 837 P.2d 1247 (1992), a suit to enforce the State's compliance with the 5(f) trust provisions. In the decision by Justice Klein, (now counsel for the OHA Trustees in this case), he said, "Additionally, unless members of the public and native Hawaiians, as beneficiaries of the trust, have standing, the State would be free to dispose of the trust res without the citizens of the State having any recourse."

Another significant legal flaw in the Court of Appeals' Memorandum disposition is that it relies on a standard for intervention of right that was eliminated from Rule 24(a)(2) in 1966.

> He [Marumoto] does not contend that he would be bound by any decision in this case or that, by virtue of stare decisis, a proper party would be

precluded from raising his challenges to the State's actions in a separate action.

Former Rule 24(a)(2) required that the intervenor be legally "bound" so that the judgment would have a res-judicata effect as to the intervenor. This created difficulties with intervention in class actions and could defeat intervention in some meritorious cases. That test was eliminated in the 1966 Amendment and is not part of the present Rule 24(a). Federal Rules of Civil Procedure, Rules and Commentary, Gensler, 2010 Vol. 2, page 166, Advisory Committee Notes.

Marumoto has and does contend that if he is precluded from intervening in *Day v. Apoliona*, 496 F.3d 1027 (9th Cir. 2007) his ability to protect his equitable ownership interest in the Ceded Lands Trust may, as a practical matter be impaired or impeded.

The law of the case in *Day v. Apoliona* is unambiguous that: (1) The Ceded Lands Trust is for *all* the citizens of Hawaii, not just for one racial group; and (2) Trust beneficiaries have standing in federal court to maintain a suit against the Trustee State of Hawaii, or responsible State officials, including the OHA trustees, for breach of trust. Practical experience has shown that is not the law of all cases in the District of Hawaii.[2]

---

[2] The *Kuroiwa* case was dismissed and the undersigned attorney was sanctioned for arguing that the August 7, 2007

(Continued on following page)

The *Day v. Apoliona* case is now in the Ninth Circuit and review by this, the highest Court of the land, is being sought. If this Court upholds Marumoto's right to intervene, redress will not be far behind, as compared with the impediment of starting the long expensive journey all over again in a court which may or may not follow the law of the Ninth Circuit as enunciated by *Day* in 2007. This impediment to his ability to protect his interest is a practical reality; and under Rule 24(a)(2) practical matters are what count.

Finally, on this point, there is the real and actual, not just hypothetical, ongoing impairment of and impediment to Marumoto's ability to protect his equitable interest in the trust funds spent and lost on investments by OHA since his motion to intervene was purportedly "mooted" on June 20, 2008. For example, OHA's annual reports show investment losses of $24.5 million for 2008 and $73.6 million for 2009. (See chart below, just before the Conclusion.) The ability of Marumoto and the about 1 million other citizens similarly situated to protect their share of that about $100 million has not only been impaired

---

decision in *Day v. Apoliona* should be followed rather than the *Arakaki v. Lingle* decision which had relied on over-generalized dicta in the *Carroll/Barrett* decision to the effect that trust beneficiaries lack standing to challenge the interpretation of § 5(f) of the Admission Act because they did not and cannot sue the U.S. Marumoto and the undersigned attorney respectfully pursue this case and appeal by non-frivolous arguments for modifying or reversing the existing law as determined by those decisions or for establishing new law.

and impeded, those funds are almost certainly lost to them forever.

II. Trust law as to distributions to beneficiaries.

Under the Uniform Principal and Income Act, "UPIA" HRS, 557A, unless the trust terms provide otherwise, Income Beneficiaries are entitled to net income. In exercising . . . a discretionary power of administration regarding a matter within the scope of this chapter, whether granted by the terms of a trust, a will, or this chapter, a fiduciary shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries.

UPIA, HRS § 557A-201 "Determination and distribution of net income," has no provision permitting distribution to income beneficiaries when there is no net income.

The Restatement of the Law, Second, Trusts, 1959, puts it this way:

§ 233 Allocation of Receipts and Expenses to Principal or Income.

(1) Except as otherwise provided by the terms of the trust, if property is held in trust to pay the income to a beneficiary for a designated period and thereafter to pay the principal to another beneficiary,

(a) the former beneficiary is entitled to, and only to, the net income during such period, and

(2) The net income is ascertained by subtracting expenditures allocable to income from receipts allocable to income.

State: Beneficiaries only entitled to net income.

The State of Hawaii in its May 2, 1997 Appellant's Amended Opening Brief in *OHA v. State*, Civ. No. 94-0205-1 before the Hawaii Supreme Court made the same point beginning at (Cross Pet. App. 93) vigorously, and correctly argued to the Supreme Court of Hawaii,

> it is a well-established principle of the law of trusts that beneficiaries are entitled only to the net income from the trust. In re Bernice P. Bishop Estate, 36 Haw. 403, 427 (1943) (Kemp, C.J.) (noting that "'annual income' clearly refers to the net annual income"): *id.* at 464 ("[t]he word 'income' as employed in the will unquestionably means net income") (Peters, J., concurring in part and dissenting in part).
>
> 2A SCOTT & FRATCHER, THE LAW OF TRUSTS § 182, at 550 (4th ed. 1987) (trustee's duty to pay income to beneficiary is limited paying "the net income, after deducting from the gross income the expenses properly incurred in the administration of the trust").
>
> Thus, where the trust consists of an on-going business enterprise, the trustee's duty to pay income to the beneficiaries relates only to the net income, i.e., the income remaining after

the trust has paid for the costs of goods and services needed to operate the business or administer the trust. See In re Sulzer's Estate, 185 A. 793, 796 (Pa. 1936); Smith v. Jones, 162 So. 496, 498 (Fla. 1935); Woodard v. Wright, 22 P. 1118, 1119 (Cal. 1889): 3A SCOTT & FRATCHER, supra, § 244, at 324-325 ("[i]t is obvious that the cost of administering a trust should be borne by the trust estate and not by the trustees personally if those costs are properly incurred"). *Id.* at 323.

In addition to operating expenses, net income also takes into account depreciation or amortization of the capital cost of improvements that the State has constructed at taxpayer expense on ceded land. 3A SCOTT & FRATCHER, supra, § 244, at 325. There is no dispute that the State had the right to construct improvements upon the ceded land; not even OHA claims that the State had the right to construct improvements upon the ceded land; not even OHA claims that the State breached its fiduciary duties by constructing, say, the Honolulu International Airport, public housing, or hospitals on ceded land.

What this means, then is that OHA is not entitled to 20% of the gross receipts of the Hilo Hospital or the public housing, but only to 20% of the net income (if any) from those facilities (unless they are sovereign functions, see subpoint C, infra). Any other interpretation leads to absurd results. For

> example, if the State were to operate a race track, a lottery outlet, or even a credit union on ceded lands, OHA's interpretation would entitle it to 20% of the wagers made at the race track, amounts paid for lottery tickets, or deposits made at the credit union.
>
> Moreover, most businesses • to say nothing of government agencies operating public housing and hospitals for the poor – never achieve a 20% profit. Consequently, OHA's claim to 20% of the gross revenue could be satisfied only by allocating additional taxpayer revenue from the general fund. In the end, a "gross receipts" approach would massively discourage the State from using the ceded lands for any activity that both generated high receipts and incurred substantial expenses, even if such were otherwise the highest and best use of the ceded lands.

Thus, during all of the years since the State of Hawaii became the Trustee in 1959, there could never have been any annual net income from which the State as Trustee could lawfully have made distributions to beneficiaries. This means that the hundreds of millions of Ceded Lands Trust revenues the State has distributed exclusively to OHA over the last three decades for the betterment of native Hawaiian or Hawaiian beneficiaries, while making no distributions exclusively for all the rest of the beneficiaries, have all been under a false premise: That OHA was receiving only the income and proceeds from that pro rata portion of the Ceded Lands Trust for native

Hawaiians.[3] This misapplication of trust funds was undisclosed because the State never, so far as the undersigned attorney has been able to determine after diligent inquiry, before June 4, 2008 published a separate accounting for the Ceded Lands Trust.

The result has been to illegally divert trust funds equitably owned by all the people of Hawaii. Such conduct would appear to meet the definitions of HRS § 708-974 (Misapplication of entrusted property, a misdemeanor) or Theft, HRS § 708-830(6)(a) (Failure to make required Disposition of funds, a felony).

To its credit, the State of Hawaii did not on appeal in Ninth Circuit No. 08-16668 appear to dispute the accuracy of its revelation or the dispositive impact of that revelation on the merits of this case. The State on December 11, 2008 (Docket Entry 6736209) submitted electronically a notice that it did not intend to file an Answering Brief in that appeal.[4]

As established by OHA's own financial statements, the State of Hawaii, since 1980, has been distributing to OHA 20% of certain funds derived from the Ceded Lands Trust as the "income and

---

[3] Hawaii Constitution, Art. XII, Sec. 6.

[4] The State's notice of intent not to file answering brief was stricken by the Clerk of Court on December 16, 2008 because it was submitted electronically as a brief. The Clerk instructed the State to submit it as "File Correspondence to Clerk." The docket is not clear whether that has been done but, in any event, the State did not file an answering brief in No. 08-16668.

proceeds from that pro rata portion of the" Ceded Lands Trust "for native Hawaiians." The magnitude of the annual payments is shown on the following chart. During those years the State distributed *no* trust cash or land exclusively for the pro rata portion of the trust for the other beneficiaries.

The mootness doctrine would be particularly out of place if it enables the trustee of the largest public trust in Hawaii to continue the breach but evade review.

State's cash distributions to OHA FYE 1981-2009 (Per Fiscal Year as shown on OHA financial statements.)

FYE 6/30	General Fund	Public Land Trust	Interest/ Dividends earned
1981	225,000	1,553,935	35,909
1982	415,466	1,117,005	252,572
1983	540,785	1,380,037	190,613
1984	535,861	1,493,209	167,526
1985	567,178	1,368,834	290,876
1986	589,310	1,452,541	210,219
1987	596,881	1,691,827	214,347
1988	1,297,395	1,188,960	249,635
1989	1,347,638	1,238,429	312,421
1990	2,080,692	1,616,181	363,996
1991	2,052,962	10,800,153	671,492
1992	3,590,887	8,993,725	842,856

1993	3,854,524	139,957,130 *	1,181,983
1994	4,026,704	18,747,890	5,216,977
1995	3,584,625	25,087,967	8,199,984
1996	3,496,698	12,329,159	8,802,574
1997	2,772,596	7,124,122	9,513,999
1998	2,808,201	15,106,347	10,857,620
1999	2,729,382	15,100,000	10,626,578
2000	2,550,922	8,238,109	10,798,857
2001	2,519,663	8,261,921	11,465,433
2002	2,619,663	6,535	9,909,545
2003	2,532,663	17,543,804	8,444,469
2004	2,532,647	9,740,578	3,492,365
2005	2,498,960	10,798,706	6,339,076
2006	2,755,011	32,599,833	11,417,954
2007	2,828,458	15,100,000	16,940,017
2008	3,043,921	15,100,000	**
2009	2,965,721	15,100,000	**
	$63,960,414	$399,836,937	$137,009,893

* Includes $134,584,489 distributed to OHA in 1993 for 6/16/80-6/30/91.

** OHA's Investment losses: 2008 – ($24,542,791); 2009 – ($73,639,530).

CONCLUSION

The Day petition and Marumoto's conditional cross-petition should be granted.

Respectfully submitted,

H. WILLIAM BURGESS
2299C Round Top Drive
Honolulu, Hawaii 96822
(808) 947-3234
hwburgess@hawaii.rr.com

Attorney for Cross-Petitioner

November 24, 2010